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Citations

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international unions representing about thirteen million members, by far a majority of the organized working people in the United States. Although the petitioner in this case is not a Federation affiliate, the issues in the litigation are of profound concern to the AFL-CIO. The conclusion below that a union's program of wage equalization in an industry may constitute a restraint of trade in violation of the antitrust laws strikes at the very existence of a meaningful labor

movement. As former Professor Archibald Cox has noted, trade union philosophy since its early days "has consistently held that a union cannot be effective unless organization is coextensive with the market and eliminates price competition based on differences in labor standards."[1]

The AFL-CIO is therefore directly interested in presenting to the Court its views on this latest endeavor to regulate the traditional activities of American labor organizations through the application of laws whose entire concept is alien to those organizations' nature and purposes.[2]

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[1] Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Univ. Pa. L. Rev. 252, 276 (1955). See also Brandeis, J., dissenting in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 480-82.

[2] Because of the overriding importance of the question raised by the holding that a union's attempt to secure uniform labor standards may be an antitrust violation, we concentrate on that issue alone. But we also agree with petitioner that predicating an antitrust violation upon union and employer efforts to obtain a particular Walsh-Healey prevailing wage determination from the Secretary of Labor (see R. V, 1758-59, 1763-64) is directly contrary to this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136, 138 ("the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," even if the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy *** competitors").

We furthur agree that even assuming *arguendo* the courts below were correct that a jury could infer the existence of a union-employer conspiracy if it found the union's "purpose" in seeking uniform wages was to help the major coal producers eliminate the smaller and weaker firms (see R. III, 1550a-52a, 1556a, 1558a-62a, 1564a-65a; V, 1752-56), there was insufficient evidence to send the present case to the jury because, as the trial judge himself realized (though he failed to act on that realization): "Before a fact sought to be established *** can be said to have been proved by circumstantial evidence alone, such as the alleged conspiracy, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inferences to the contrary can be drawn from the same circumstances" (R. III, 1560a). See *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-40; *NLRB* v. *Stafford*, 206 F.2d 19, 23 (8th Cir. 1953); *Ford Motor Co.* v. *Mondragon*, 271 F.2d 342, 345 (8th Cir. 1959); *Delaware*

SUMMARY OF ARGUMENT

Two decades ago this Court laid down the principles which can dispose of this case. First, the concern of the Sherman Act is the product market, not the labor market; the elimination of wage competition among workers, and the elimination of price competition among employers based on differences in labor standards, are not the types of restraints upon commercial competition at which the Act is aimed. Secondly, a labor organization acting alone is immunized by statute from antitrust liability even if it operates directly on the product market to fix prices, allocate markets, or otherwise restrict commercial competition; only if a union acts in combination with a nonlabor group

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Valley Marine Supply Co. v. *American Tobacco Co.*, 297 F.2d 199, 205-07 (3d Cir. 1961); *cf. Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 210 (9th Cir. 1957), *cert. den.* 356 U.S. 975. See also §6 of the Norris-LaGuardia Act, 47 Stat. 71, §6 (1932), 29 U.S.C. §106: "*** no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis supplied.)

In the present case there was no direct evidence that the union's wage standardization drive was undertaken pursuant to a union-employer agreement to eliminate competition, and there was undisputed testimony by the union's principal officers that no union-employer conspiracy to restrain trade existed (R. V, 1753; I, 392a; III, 1139a-40a, 1189a, 1224a-25a). Even if the law of union antitrust liability were still in the primitive state represented by the *Coronado* cases, it would apparently be recognized that a campaign for unionization and for uniform labor standards was at least as consistent with the purpose of improving employees' working conditions as with the purpose of interfering with interstate commerce, and that in the absence of other evidence establishing the union's unlawful intent, no purpose to restrain trade could be inferred. See *Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 408-09, 411; *Coronado Coal Co.* v. *Mine Workers*, 268 U.S. 295, 308, 310. *Cf. Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485-87, 509. The District Court therefore erred in allowing the jury to speculate about the union's "purpose," even if that subjective purpose were material in this case—which, as the text demonstrates, it is not.

to achieve such a direct commercial restraint does it become subject to regulation under the antitrust laws.

The Court of Appeals below erred (R. V, 1750) because it concentrated on the second proposition and ignored the first. A union's wage equalization program is activity strictly within the labor market, to which the Sherman Act has no application, and the question whether a union "combines" (*i.e.*, bargains collectively) with employers to establish labor standards is thus irrelevant. The District Court below erred (*e.g.*, R. III, 1550a-51a) because it failed to consider that any union program for wage standardization has the implicit "purpose" of eliminating *substandard* competition. One is but the obverse of the other. Since labor standards are outside the ambit of the Sherman Act, it follows as a necessary corollary that they cannot be brought within it by a jury's factual finding which merely articulates one of their inherent purposes.

The issue presented by the Mine Workers' campaign for uniform terms of employment in the coal industry can therefore readily be resolved on the basis of long-established precedent. As *amicus*, however, the AFL-CIO urges the Court not only to reaffirm the inapplicability of the Sherman Act to the area of labor standards, but also to reexamine the continued appropriateness of any antitrust regulation of union conduct. Comprehensive federal legislation has been enacted during the past two decades to deal specifically with this subject. Both the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 contain provisions expressly designed to cover many types of union activity once controlled through the antitrust laws. To preserve uniformity in national labor policy, and to avoid an incongruous overlap of rules and remedies under the various statutes, we submit the NLRB should have the exclusive primary jurisdiction to pass upon the legality or illegality of union conduct arguably falling within the regulatory scheme of the amended National Labor Rela-

tions Act. Part II of the Argument will develop this latter point.

ARGUMENT

I. The Sherman Act Is Inapplicable To Labor Standards Or The Elimination of Competition Based on Differences In Labor Standards, And So A Union's Wage Equalization Program Cannot Constitute An Unlawful Restraint Of Trade.

A. Legality of Seeking Uniform Wages and Working Conditions Throughout an Industry

Whether the Sherman Act can be used to thwart the establishment of uniform labor standards in an industry is of such paramount importance to organized labor that our brief will be devoted almost entirely to this one issue, even though several other significant questions are also presented.[3] The single point we will treat is enough in itself to require reversal of the Court of Appeals' affirmance of the judgment entered in the District Court. The trial judge did not merely admit evidence of the Mine Workers' campaign for equal wages and working conditions in the coal industry as one of many items which the jury could consider in determining whether there was some broad conspiracy among the union and certain employers to restrain trade by various means. Instead, the court charged that it was "for the jury to determine whether there was a purpose among the alleged conspirators to impose the national contract upon small operators for the purpose of restraining trade, monopolizing and driving small companies out of business; or, whether the purpose was to improve working conditions, better pay, more welfare benefits, and better job security" (R. III, 1550a-51a; see also R. III, 1552a, 1556a, 1558a-62a, 1546a-65a). And if the

[3] Our accord with petitioner on other points is discussed in note 2, *supra*.

jury found the union intended "to impose a contract upon an employer" for the former purpose, then, continued the court, "*such activity* comes under the anti-trust law and is prohibited" (R. III, 1552a; emphasis supplied). The jury was thus instructed that, given the supposedly improper "purpose," a union's program for achieving uniform labor standards in an industry could, in itself, constitute a violation of the Sherman Act.[4] In this the court erred.

In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, this Court set forth the first of two propositions which sum up the modern view toward the relationship between the antitrust laws and the labor market and labor union activities. Justice Stone, speaking for the Court, first pointed out that the Sherman Act, 26 Stat. 209, §§ 1, 2 (1890), as amended, 15 U. S. C. §§ 1, 2, with its prohibition of every "combination *** in restraint of trade" and of every attempt "to monopolize *** trade," had been enacted for the specific purpose of preventing "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market." 310 U. S. at 493. He went on to say that the Act was not applicable to any case, "whether or not involving labor organizations or activities," unless there was "some form of restraint upon *commercial competition in the marketing of goods and services.*" *Id.* at 495. (Emphasis supplied.)

Turning to the labor market, the Court observed that a "combination of employees necessarily restrains competi-

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[4] The union's first objection to the trial court's charge was that it failed to include a requested instruction stating: "Even if the Union and the coal companies with whom it bargained collectively realized that the wage rates and benefits provided in the agreement could not economically be met by a company unable to mechanize its production, this, of itself, would constitute no violation of the anti-trust laws. (Apex Hosiery Co. v. Leader, 310 U.S. 469 [1940]" (R. III, 1580a). The Mine Workers pursued this point in motions for a new trial (R. I, 72a, 81a). See also Question No. 1 of the petition for certiorari, p.4.

tion among themselves in the sale of their services to the employer," but such a combination did not fall within the common law meaning of "restraint of trade" incorporated by Congress into the Sherman Act. *Id.* at 498, 502. The Court further recognized that successful union activity in consummating wage agreements "may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards," and that "in order to render a labor combination effective it must eliminate the competition from non-union made goods." *Id.* at 503. But, concluded the Court, "an elimination of price competition *based on differences in labor standards*" is not "the kind of curtailment of price competition prohibited by the Sherman Act." *Id.* at 503-04. (Emphasis supplied.) Accordingly it was held that a labor organization's violent sit-down strike at a plant which had refused to accede to demands for a union contract did not constitute a violation of the antitrust laws.

The opinion in *Apex* was a realistic acknowledgment that the antitrust laws, based as they are on the philosophy of promoting commercial competition among business firms, are simply not the appropriate vehicle for regulating activities concededly carried on to eliminate wage competition among employees, particularly when those activities are approved by public policy. Justice Stone found that approval in the body of federal labor legislation enacted in the 1930s, including the Norris-La Guardia Act, the Railway Labor Act of 1934, the National Labor Relations Act, the Public Contracts Act, and the Fair Labor Standards Act, which he said "'clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy.'" 310 U. S. at 504, n. 24.

While a labor union was involved in *Apex,* it is evident that the Court was primarily concerned with the kind of

restraint, "whether or not involving labor organizations or activities." See 310 U. S. at 495.[5] The principle established by *Apex* is that only restraints on "commercial competition" in the "marketing of goods and services" are proscribed by the Sherman Act; the elimination of wage competition among employees, and the elimination of price competition among employers "based on differences in labor standards," are wholly outside the ambit of the statute. The product market, not the labor market, is the proper domain of the antitrust laws, and activity in the labor market to set wages, hours, and working conditions, whatever its indirect effect, is not within their purview.

The second basic principle reconciling the antitrust laws and the labor field was enunciated in *United States* v. *Hutcheson*, 312 U. S. 219, and *Allen Bradley Co.* v. *IBEW Local 3*, 325 U. S. 797. Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738, §§6, 20 (1914), 15 U.S.C. §17, 29 U.S.C. §52, and the Norris-La Guardia Act, 47 Stat. 71 (1932), 29 U.S.C. § 101 *et seq.*, were read together as manifesting a congressional intention to immunize a labor organization entirely from the coverage of the Sherman Act whenever, in the course of a labor dispute, it "acts alone" and not "in combination with business groups," even though its activities may directly affect the product market. *Allen Bradley*, 325 U. S. at 809-10; see also *Hutcheson*, 312 U. S. at 232. Conversely, unions have been subject to regulation under the antitrust laws if they "aid and abet manufacturers and traders in violating the Sherman Act," since a "business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Allen Bradley*, 325 U. S. at 810, 811. The applicability of this second labor exemption therefore depends in any given case upon

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[5] In our view, agreements among employers acting alone, without the intervention of a union, to fix labor standards would likewise have no antitrust implications. To this effect is *Kennedy* v. *Long Island R. Co.*, 319 F.2d 366 (2d Cir. 1963).

the parties who impose the restraint and not upon the kind of restraint imposed. But of course one never need reach the question of whether a union is entitled to rely upon its antitrust immunity as a labor organization "acting alone" unless it is first decided that there has been the kind of restraint upon commercial competition which falls within the ambit of the antitrust laws.

In *Allen Bradley*, for example, a union participated directly in devising and executing an elaborate scheme[*] whereby the entire New York City market for electrical equipment was monopolized for local manufacturers. The union, which represented employees of both manufacturers and contractors, obtained agreements from the manufacturers to sell equipment only to union contractors and agreements from the contractors to buy only from local, union manufacturers. The union in turn boycotted all equipment manufactured out of state. The business of the local manufacturers burgeoned, and the contractors, aided by a bid-rigging system, also profited through inflated prices. Plainly, this was not just conduct restraining competition in the labor market, which would have been outside the Sherman Act under the *Apex* rule. As this Court said, there were "industry-wide understandings, looking not merely to terms and conditions of employment but also to *price and market control.*" 325 U. S. at 799-800. (Emphasis supplied.)

The Court of Appeals below utterly failed to realize that in assessing antitrust liability, the kind of restraint is as significant as the nonlabor combination. It only examined the question "whether a labor organization is exempt from the provisions of the anti-trust laws under Sec-

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[*] The full facts of the *Allen Bradley* conspiracy are set forth in the opinions of the District Court, 41 F. Supp. 727 (S.D. N.Y. 1941) and 51 F. Supp. 36 (S.D. N.Y. 1943), and of the Court of Appeals, 145 F. 2d 215 (2d Cir. 1945), incorporated by reference in this Court's opinion, 325 U.S. at 789.

tion 6 of the Clayton Act" (R. V, 1750). The principle established by *Apex* was never discussed. Having so misconstrued the law by ignoring one critical issue, the Court of Appeals then concluded it was for the jury to determine "whether the Union acted alone in carrying out the legitimate objects of labor unions" (R. V, 1751).

The trial judge's instructions evidenced awareness that a union's wage equalization program effectuated through uniform labor contracts is not by itself an antitrust violation (R. III, 1556a, 1564a), but they failed to take account of the necessary implications of that rule of law. The District Court's charge allowed the jury to transform conduct wholly outside the antitrust sphere into a Sherman Act violation simply by a factual finding that the union sought to impose the national contract throughout the industry for the "purpose" of driving out small companies unable to meet the prescribed labor standards (R. III, 1550a-52a; see also R. III, 1556a, 1558a-62a, 1564a-65a). Yet it seems obvious that any union program for achieving standardized wages and working conditions carries with it the implicit "purpose" of eliminating the substandard competition of inefficient employers who cannot conform. *Cf. Apex Hosier Co.* v. *Leader*, 310 U. S. 469, 503 ("a labor combination *** must eliminate the competition from non-union goods"). Since labor standards as such are not within the purview of the Sherman Act, they surely cannot be placed there by a jury finding which does no more than spell out one of their inherent purposes.

This view is in accord with the formal declarations of Congress. Elimination of substandard wage competition, either by collective bargaining or by statute, is an avowed goal of national labor policy. Section 1 of the National Labor Relations Act, 49 Stat. 449 (1935), as reenacted by 61 Stat. 136, § 101 (1947), 29 U. S. C. § 151, states that inequality of bargaining power burdens commerce and aggravates business depressions "by preventing the stabili-

zation of competitive wage rates and working conditions within and between industries." Section 2(a) of the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C. § 202(a), says that the existence of "labor conditions" insufficient for a "minimum standard of living *** constitutes an unfair method of competition in commerce." And in the Walsh-Healey Act Congress brought to bear "the leverage of the Government's immense purchasing power to raise labor standards" by eliminating substandard producers from eligibility for public contracts. See *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507.

The numerous commentators who have wrestled with the problem of union antitrust liability have almost invariably accepted as their point of departure the proposition that components of the labor market like wages, hours, and working conditions are, and ought to be, beyond the reach of the Sherman Act. Even critics taking issue with the *Hutcheson-Allen Bradley* rule that a union acting alone is totally immune from the antitrust laws regardless of whether its activities directly affect the product market have endorsed the *Apex* rule that labor standards are outside the ambit of those laws. Thus, the Attorney General's National Committee to Study the Antitrust Laws recommended "appropriate legislation" in this area, but strictly confined its scope:

> "It should cover only specific union activities which have as their direct object *direct control of the market*, such as fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be sold, or the number of firms which may engage in their production or distribution. By 'object' this Committee means only the immediate concession demanded from an employer as a condition precedent to halting coercive action against him."[1]

[1] *Report of the Attorney General's National Committee to Study the Antitrust Laws* 304-05 (1955). (Emphasis supplied.) The House of

We are in accord with former Professor Archibald Cox's understanding that, under the Committee's recommendation, union demands "phrased in the *conventional terms of wages, hours and conditions of employment* could be pressed legitimately even though their practical effect was to reduce competition in the sale of the employer's product." [8] Professor Cox himself seems to have come to something like the same conclusion. In discussing the three-day work week once used by the Mine Workers to spread available employment, he recognized that often "a beneficent limitation on hours of work will affect production or sales." [9] But after noting that some definite line must be drawn "unless the law is to interfere with normal collective bargaining about the length of the work week," he decided that "[p]ossibly the best solution is to deal with the clear abuses by outlawing only restrictions *phrased in terms of volume* [of production or sales], leaving close cases untouched in order to avoid the interference." [10]

The courts below did not suggest that the Mine Workers' national contract was phrased other than in terms of wages, hours, or working conditions. In their willingness, and particularly in the willingness of the trial court, to go beyond the contract to scrutinize its "purpose," they have ignored what seems the most practicable test for ensuring that restraints in the labor market are not mistaken for restraints in the product market: the agreement itself.

Both "purpose" and "effect" are inappropriate tests for

Delegates of the American Bar Association once went on record in favor of amending the antitrust laws to extend their coverage over labor organizations, but said the field it wished to have regulated was that defined in *Apex* as "commercial competition." See 77 American Bar Association Reports 454, 479 (1952).

[8] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 253-54. (Emphasis supplied.)

[9] *Id.* at 282.

[10] *Ibid.* (Emphasis supplied.)

classifying union conduct, as Professor Cox emphasizes: "Motivation is a slippery guide, for a man can always be found to, and in a sense does, intend any consequence which foreseeably follows from his conduct. Did the Machinists intend to limit commercial competition or only to spread their membership when they negotiated contracts with the St. Louis breweries requiring new machinery to be installed by contractors who had collective agreements with the Machinists' rather than the Millwrights' Union? If proof of an adverse 'effect' on consumers is enough even though the union confines itself to the labor market, then the act *** might also affect bargaining demands which have an impact on price competition or the level of production." [11] He sums up as follows:

> "In my opinion, a case can be made out for applying the Sherman Act only to those union imposed restraints which fall in the category discussed previously in this article—tampering with the product market for the sake of sheltering employers from competition *otherwise than by organizing the employees of competitors and raising their labor standards.*[12]

Recently, a study group of leading labor scholars, headed by President Clark Kerr of the University of California, reiterated the distinction between the product market and the labor market, and found antitrust concepts relevant only in the former. Said the group:

> "This proposed application of the anti-trust concept is, of course, a limited one, and should be made part of national labor legislation rather than of existing

[11] *Id.* at 263-64. The St. Louis case was *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

[12] *Id.* at 280. (Emphasis supplied.) Professor Cox was talking about a prospective extension of antitrust coverage. He continued:

> "Even here the issue turns on balancing the practical need for legislation—which has never been demonstrated—against the difficulties in writing prohibitions which would neither charge the courts with making labor policy nor cast doubt on organizational activities and collective bargaining."

law regulating business behavior. The recommendation does not interfere with union activities in labor markets, such as union efforts *to establish uniform wage levels and to control the size of wage differentials.* These are among the principal economic activities of market-wide unions. If they are prohibited, effective unionism is destroyed." [13]

In the instant case the Mine Workers, in seeking to enforce their national agreement throughout the coal industry, were acting in the classic pattern. Their conduct was traditional labor market activity to eliminate competition among the industry's employees by establishing *uniform* standards of wages, hours, and working conditions. In the next section we shall consider whether another question might be presented if the union had done something like demanding of certain employers a substantially different wage level. But in the present situation no such issue arises. The very uniformity of the terms sought is in itself a warrant that the union could not possibly have been endeavoring to bar from the market competitors as such, but only, in the strictest sense, *substandard* competitors. Put in another writer's terms, this is the plainest case of where "marginal competitors are being excluded by the imposition of labor union standards," and not a case where favored employers "are being sheltered from all competition." [14]

To apply in these circumstances the "purpose" doctrine which was evolved below is to allow the fact-finding process to make a mockery of long-established and well-accepted rules of law. The pitfalls are amply demonstrated by *Alco-Zander Co.* v. *Clothing Workers,* 35 F.2d 203 (E. D. Pa. 1929). The unionized garment industry of New York was

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[13] Independent Study Group, *The Public Interest in National Labor Policy* 130 (1961). (Emphasis supplied.)

[14] See Bernhardt, "The *Allen Bradley* Doctrine: An Accommodation of Conflicting Policies," 110 Univ. Pa. L. Rev. 1094, 1116 (1962).

being undersold by the lower-priced, nonunion garment industry of Philadelphia. The union, fearing for the future of the New York industry, started a broadscale organizing drive in Philadelphia. Strikes at Philadelphia factories were enjoined as violations of the Sherman Act. The court declared that "the primary *purpose* of the campaign for the unionization of the Philadelphia market was the protection of the unionized markets in other states," and that "the *object* of the strikes was to put an end to all production in Philadelphia under nonunion conditions and only to permit it to be resumed if and when the manufacturers were willing to operate upon an union basis and under union wage scales." 35 F. 2d at 205. (Emphasis supplied.) That *Alco-Zander* is bad law, in the light of *Apex*, can hardly be doubted. Yet the precise description of the union's purpose there encompasses everything that could accurately be said of the union's purpose here. It would be a contradiction in terms to assert that a union demanding the same national contract of all employers is seeking to eliminate competition as such. By definition it is only seeking, like the union in *Alco-Zander*, to eliminate competition "based on differences in labor standards." And that, under *Apex*, it has every right to do.

The right is also a necessity. As *Alco-Zander* demonstrates, and as this Court recognized in *Apex*, a union cannot maintain labor standards in organized firms if those firms are consistently outbid by unorganized firms operating with cheap, nonunion labor. If the union cannot equalize wages, its own employers may be forced out of business. In this sense it is a truism to say that the union and the organized employers may share a common "purpose," implicitly, explicitly, or even by agreement, to see that substandard competitors are eliminated if they cannot or will not meet the union wage scale. (Purposes of course may be mixed. The employers for their part may well have in mind a purpose which is likely to be in the

background of almost any business decision—the desire to disadvantage competitors generally.) But so long as the conduct is limited to activity in the labor market—to agreements or efforts to secure agreements covering wages, hours, or working conditions—the purpose of either unions or employers, or the sharing of a common purpose, is irrelevant to the antitrust laws. Any other conclusion partakes of the fallacy we have already discussed: it allows unregulated conduct to become subject to regulation through the mere articulation of a purpose which, in one way or another, inheres in all such conduct.

Perhaps the deepest practical objection to the "purpose" doctrine is that it would enable trial courts and regionally minded juries to become once again the shapers of our national labor policy. Justice Brandeis long ago exposed the inadequacies of the theory whereby union conduct "became actionable when done for a purpose which a judge considered socially or economically harmful, and therefore branded as malicious and unlawful." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 485 (dissenting opinion). Now, as Columbia's Professor Michael Sovern has warned, "under the guise of applying *Allen Bradley*, the courts could conceivably grab back a considerable measure of the power taken from them by the Clayton and Norris-LaGuardia Acts." [15] The present case illustrates this well. The judge charged that there was no violation of the Sherman Act in the establishing of wages and welfare payments through the national contract, "provided" the Mine Workers and the major coal producers had not agreed to fix "high" rates "in order to drive the small coal operators out of business" (R. III, 1556a). Such an instruction in effect invited twelve jurymen to become arbiters of the propriety of the wage scale in the nation's coal industry. If the jury found the wage scale too "high," it

[15] Sovern, "Some Ruminations on Labor, the Antitrust Laws and *Allen Bradley*," 13 Lab. L. J. 957, 962 (1962).

could impute the unlawful purpose. Apart from every other legal defect in the theory relied on below, the devastating practical implications of subjecting the institution of collective bargaining to the whims and speculations of local juries are alone enough to condemn it.

B. Scope of the Rule in Other Circumstances

Important as it is, the present case is at bottom an easy one. The Mine Workers sought to obtain throughout the coal industry an authentic national contract establishing uniform terms of employment, so the only purpose of eliminating competition which could conceivably be inferred would be the purpose of eliminating *substandard* competition in the most technical meaning of that term. A different case might arguably be presented if a union refused outright to deal with certain employers, or if it demanded of some employers terms and conditions of employment substantially more costly than it demanded of others.

The decisions of this Court indicate, however, that there would be no difference. If a particular restraint is not the kind of restraint encompassed by the Sherman Act, it is not drawn within the Act whether imposed uniformly, arbitrarily, purposelessly, or purposefully. Although we can rely upon the most narrow reading of the phrase "labor standards" to support the conclusion there was no antitrust violation in this case, this Court has never suggested that a union's activities in the labor market retain their Sherman Act immunity only so long as they are limited to securing uniform terms of employment from all employers alike.

On the contrary, in *Hunt* v. *Crumboch*, 325 U.S. 821, decided the same day as *Allen Bradley*, this Court held that a union could, without violating the antitrust laws, refuse flatly to provide any union employees to a trucking firm because of personal antagonism, and then, for the purpose

of destroying the trucker's business, have union employers cancel their hauling contracts on the ground the firm was nonunion. The Court pointed out that the Sherman Act was concerned with such restraints as "refusing to sell goods and services." 325 U. S. at 824. Laborers, on the other hand, "can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws." *Ibid.* The reason or purpose of the union's activity was immaterial, since "Congress in the Sherman Act and the legislation which followed it manifested no purpose to make *any* kind of refusal to accept personal employment a violation of the Anti-trust laws." *Id.* at 824-25. (Emphasis in the original.)

The conjunction of a nonlabor combination and a purpose to eliminate competition adds nothing relevant. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight,* 365 U. S. 127, 138, this Court held that a campaign carried out by a combination of railroads to solicit governmental action did not violate the Sherman Act, even if the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors." The antitrust laws were aimed at "business activity," not "political activity." 365 U. S. at 137. This being so, not even the anticompetitive "purpose" of the business combination "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.* at 138-39. So too, the antitrust laws are aimed at the "marketing of goods and services," not at "terms and conditions of employment." This being so, not even an anticompetitive "purpose" on the part of a union-employer combination should be able to transform into a Sherman Act violation any kind of restraint upon terms and conditions of employment. Accordingly, it would appear that even the imposition of substantial wage differentials to eliminate competition would have no more antitrust connotations than the seeking of legislation for the same end.

Practical considerations support this logic. Although union contracts tend to establish substantially similar terms of employment in an industry or area market, labor standards are by no means always identical. Contracts may expire at different times, and in these instances wage levels among various employers must necessarily be moved ahead alternately. Employees at one firm may want more cash benefits, employees at another more fringes. Job classification systems will differ from company to company. The respective bargaining strengths of a union and employers will vary from time to time, and the union may seize an opportunity to press its advantage against one or more individual employers. A union may even, as has happened in the auto industry among others, accede to a settlement significantly below the general industry standard, in an effort to tide a particular firm over a period of economic difficulties and thereby preserve the employees' jobs. Allowing a jury to infer sinister purposes from any of these variations would have the same essential vice as allowing a jury to infer a conspiracy from a union's insistence upon a uniform industry-wide contract: it would place an intolerable strain upon the normal processes of free collective bargaining.

Finally, and most simply, workers who are banded together in a union, unless they meddle directly with the product market, are dealing in only one "commodity": their own personal services. On occasion they may refuse to "sell" their services at any price. They may pick and choose among the employers to whom they will sell. They may agree with certain employers to establish a uniform selling price for all comers—or cut the rate for a favored few. But whatever they do, for whatever purpose, it all comes down to one thing: the only item they have to sell is their own labor. That is all they can "monopolize," and the only trade they can "restrain." It is late in the day to deem that fit matter for control under the Sherman Act.

As Professor Cox and the Attorney General's Committee have suggested, the most feasible test to apply is one which looks to the terms of the labor agreement sought or executed, and draws the line between provisions imposing direct restraints on the product market, and provisions dealing with the customary subjects of wages, hours, or working conditions.[16] Professor Cox would state the rule differently in cases where a particular firm is allegedly being eliminated from competition. If the antitrust laws were to apply at all, they should be confined "to situations where a trader is excluded from the market without assurance of readmission upon the union's prevailing in some controversy over the association or representation of employees or their conditions of employment." [17] As long as the conduct engaged in by a union is restricted to the conventional activity of seeking wages, hours, or working conditions, it should remain wholly outside the ambit of the Sherman Act, as *Hunt* v. *Crumboch* and *Noerr* indicate, even if a substantially different wage scale is demanded of certain firms for the purpose of hampering the competitors of favored employers.

We can propose no other workable test. A rule admitting of any exceptions would almost necessarily involve a jury in speculating on the "purpose" of a union's bargaining tactics and demands. The formulation of such a rule would require this Court to make the most sensitive policy judgments regarding the value of traditional collective bargaining, as weighed against the possibility of damage to our competitive economy. It would require the application of

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[16] See text accompanying notes 7 through 10, *supra*. Even this test on occasion would require some careful judgments. For example, the employees' legitimate interest in defining their job content and working hours may find expression in a clause spelling out the employer's operating hours. See discussion of the *Jewel Tea* case in part II, *infra*.

[17] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 282-83. Professor Cox at this point was considering possible amendments to the existing law.

business conspiracy doctrines to an area which Congress has deemed peculiarly in need of stiff evidentiary standards.[18] Furthermore, no demonstrated abuses call for such a Herculean, and potentially destructive, exercise. The lack of cases or criticisms on the point indicates that labor organizations do not, even allegedly, follow the practice of juggling differentials in wage scales to favor one competitor over another.

The principles which should be controlling can therefore be summed up briefly. Only direct restraints (not imposed by a union acting alone) upon prices, the volume of goods or services which may be sold, and other elements of the product market are the concern of the Sherman Act. Agreements or demands for agreements on wages, hours, and working conditions fall totally outside the antitrust laws, whatever may be their purpose.

II. The National Labor Relations Board Should Have Exclusive Primary Jurisdiction Over Conduct Arguably Subject To The National Labor Relations Act Even Though That Conduct Is Alleged To Be An Antitrust Violation.

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[18] Sec. 6 of the Norris-LaGuardia Act requires "clear proof" to implicate a labor organization in the unlawful acts of individual officers or members. This formal recognition that union activity is unusually susceptible to faulty inferences or interpretations combines with this Court's warning that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions," *Grunewald* v. *United States*, 353 U.S. 391, 404, to urge the tightest safeguards in any possible extension of the concept of "conspiracy in restraint of trade" in the labor field. If the time should ever come when it is felt necessary to make an exception to the rule that restrictions phrased in terms of wages and working conditions are outside the antitrust laws, *e.g.*, to cover the improbable case where artificial "labor standards" are used as a mere instrument to freeze out certain competitors, there should be no hesitancy in insisting upon "clear proof" that those labor standards are indeed just shams, in order not to imperil the federally protected institution of collective bargaining by making it vulnerable to highly dubious attack. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254.

Throughout part I of this Argument has run the distinction between wages, hours, and working conditions, on the one hand, and components of the product market, on the other. The former are exempt from regulation by the antitrust laws. In the present litigation we do not understand anyone to contend that the standard wage rates in the Mine Workers' national contract in themselves are not traditional subjects of collective bargaining. But in *Jewel Tea Co.* v. *Associated Food Retailers*, 331 F.2d 547, 549 (7th Cir. 1964), pending on petition for certiorari in No. 240, this Term, the question whether a union-sought limitation on market operating hours was or was not a "condition of employment" became, in the eyes of the Court of Appeals, the critical inquiry. The court concluded that the setting of marketing hours was a managerial prerogative, not a condition of employment, and held the union had violated the antitrust laws in insisting upon a limitation. Yet if the marketing hours were "terms and conditions of employment" within the meaning of the NLRA (as we think they were), they would have been a mandatory subject of collective bargaining; if they were not, the union's insistence on them would have amounted to an unlawful refusal to bargain. 61 State. 141-42, §§8 (a)(5), 8(b)(3), 8(d)(1947), 29 U.S.C. §§158(a)(5), 158(b)(3), 158(d); see *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349.

The instant case bristles with potential unfair labor practices of other kinds. The Mine Workers allegedly imposed the national wage agreement on the small coal operator at a time when the union did not represent its employees (R. V, 1756). For a minority union to enter into a collective bargaining contract covering all the employees in a unit infringes the rights of employees under section 7 of the Act. *Garment Workers* v. *NLRB*, 366 U.S. 731. A "protective wage clause" in the national wage agreement provided that signatory companies would not buy

coal mined under less favorable terms and conditions, and this eliminated a market for small producers unable to meet the agreement's standards (R. V, 1757). The NLRB has held the protective wage clause in the 1958 agreement violated section 8(e) of the NLRA, as amended by the Landrum-Griffin Act. 73 Stat. 543 (1959), 29 U.S.C. §158(e); *Bituminous Coal Operators Assn.*, 144 NLRB No. 29, 54 LRRM 1037 (1963); see also *Bituminous Coal Operators Assn.*, 148 NLRB No. 31, 56 LRRM 1471 (1964). And coercing any employer to enter into an agreement forbidden by section 8(e) is itself a separate unfair labor practice under section 8(b)(4)(i)(A) of the amended Act.

From all this, two conclusions follow. First, the crucial issue of whether a particular contract proposal or provision involves "terms and conditions of employment," and is thus outside the scope of the antitrust laws, is the same question which the NLRB must answer in deciding whether a particular item is a mandatory subject of collective bargaining.[19] Secondly, both the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 have introduced comprehensive regulation under the National Labor Relations Act of the very kind of union conduct which might formerly have been subjected to regulation under the Sherman Act.

Congress did this deliberately. In reporting out the Taft bill, the Senate Labor Committee had the following to say about what was to become in substance section 8(b)(4)(A) (now section 8(b)(4)(B)) of the amended NLRA:

> "This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by

[19] We naturally do not suggest that a matter which is *not* a mandatory subject of collective bargaining is necessarily regulated or prohibited by the Sherman Act. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349: "This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself."

> local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3 [citing *Allen Bradley*]." S. Rep. No. 105, 80th Cong., 1st Sess., p. 22 (1947).

The Conference Report on Taft-Hartley in its final form was still more explicit regarding the congressional decision to deal with union conduct under the labor rather than antitrust laws:

> "Secion [sic] 301 of the House bill contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies in restraining of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity (as defined in sec. 12 of the National Labor Relations Act under the House bill). Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 65 (1947).

By 1959, when the Landrum-Griffin Act was passed, even strong advocates of stricter curbs on union activities were thinking in terms of amending the labor relations statute to tighten up the restrictions on secondary boycotts and "hot cargo" clauses, and not in terms of bringing to bear the antitrust battery of treble damages and criminal sanctions. See, *e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess., pp. 78-80 (1959) (Minority Views); H. Rep. No. 741, 86th Cong., 1st Sess., pp. 97-98, 100 (1959) (Dissenting Views;

Additional Statement); *cf.* 105 Daily Cong. Rec. 11045-46 (June 29, 1959), 2 Leg. Hist. LMRDA 1507-08 (NLRB ed.) (Rep. Alger).

So we come to the critical quesiton: Has the comprehensive regulatory scheme governing labor union activity which Congress constructed after this Court decided *Allen Bradley* in 1945 displaced the antitrust laws in this area, or has it merely been superimposed upon them? Surely, for several compelling reasons, it has displaced them.

1. The presumption must be that Congress did not intend the same conduct to be regulated simultaneously by two different statutes, with varying substantive rules, varying procedures for enforcement, and varying remedies. In *Weber* v. *Anheuser-Busch,* 348 U.S. 468, this Court held that a state restraint of trade statute could not be applied to conduct which might be either protected or prohibited under the NLRA and thus subject to the exclusive primary jurisdiction of the Labor Board. See also *Teamsters Local 24* v. *Oliver,* 358 U.S. 283. The Court's strictures in *Weber,* 348 U.S. at 479, against having two "similar remedies *** brought to bear on precisely the same conduct" seem equally pertinent whether those remedies are provided by one federal and one state law, or by two different federal laws. For even if it is assumed the federal laws are likelier to be in harmony with one another, a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Local 776,* 346 U.S. 485, 490-91. *Cf. San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245: "When an activity is arguably subject to §7 or §8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board." (Emphasis supplied.)

Avoidance of a crazy quilt of inconsistent or overlapping remedies, however, is not all that militates against dual

regulation. Both *Weber* and *Garner* go much further in suggesting that when Congress enacted Taft-Hartley it was laying down a definitive and exclusive set of substantive rules to govern conduct in the labor relations field. Thus, in *Weber*, the Court declared: "Congress formulated a code whereby it outlawed some aspects of labor activities and left others *free for the operation of economic forces.*" 348 U.S. at 480. (Emphasis supplied.) And in *Garner* it was stated: "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be *free of other methods and sources of restraint.*" 346 U.S. at 499. (Emphasis supplied.) The even more detailed regulation in the Landrum-Griffin Act of secondary boycotts, hot cargo clauses, and similar means whereby a union might effectuate the type of restraint formerly held subject to the Sherman Act strengthens the implication that other "methods and sources" of regulation are no longer applicable.[20]

2. The imposition of treble damages and other penal sanctions under the Sherman Act for union activity regulated by the federal labor law goes directly counter to the policy embodied in that law. Section 303 of Taft-Hartley permits a private party to sue in federal or state court to recover "the damages by him sustained" as a result of a union's violation of section 8(b)(4) of the NLRA. 61 Stat. 158, §303 (1947), as amended by 73 Stat. 545 (1959), 29 U.S.C. §187. In *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260, this Court set aside an award of punitive damages, declaring: "Punitive damages for violations of §303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative his-

[20] Professor Michael Sovern, for one, has emphasized that such former targets of the antitrust laws as secondary boycotts and organizational efforts are now adequately dealt with under the labor relations law, and that "many of the proposals for applying the antitrust laws to unions merely call for needless, and perhaps even confusing, duplication of existing remedies." Sovern, *supra* note 15, 13 Lab. L. J. at 958-59.

tory, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by §303 should be limited to actual, compensatory damages." Although the punitive damages at issue in *Morton* were grounded on state common law, the Court's rationale would seem at least as applicable to the treble damage remedy and other penal sanctions available under the federal antitrust laws.

Moreover, language in the Court's opinion in *Morton* indicates that section 303(a) not only forecloses punitive damages for activity proscribed by it; it also marks the outermost limits of the kind of union organizational or boycott activity which can be the basis of any private suit for damages. Said the Court: "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" 377 U.S. at 258. This reinforces the view that Taft-Hartley and the amendments to it have totally displaced other law in the area it occupies.

3. Antitrust suits over union activities would force the courts to usurp the function of the NLRB in regulating the subject matter of collective bargaining. As previously discussed, "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining under the NLRA, and beyond the sweep of the Sherman Act. But as *Jewel Tea* shows, exactly what is embraced within "terms and conditions of employment" is not at all self-evident. This means that any time a court undertakes to consider whether a particular union agreement, or union efforts to get a particular agreement, run afoul of the Sherman Act, it must first take over the Labor Board's job of deciding whether the agreement or the proposal involves "terms and conditions of employment." Plainly, the preferable course is to leave that issue to the initial determina-

tion of the agency Congress specifically entrusted with the task, the NLRB.

The purposes and activities of labor organizations are avowedly, and rightly, anticompetitive. To continue regulating them under laws based upon a directly contrary philosophy, and aimed primarily at business activities, cannot but frustrate the "goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts," which is "the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295.

We respectfully ask this Court to reconsider this question, and to rule that where union conduct is subject to comprehensive regulation under the Taft-Hartley Act and its amendments, the Sherman Act has no place.

III. Restrictions On A Union's Efforts To Secure Uniform Wages And Working Conditions Would Serve No Valid Purpose Of The Competitive Economy And Would Jeopardize Widely Accepted Bargaining Arrangements.

We have established that under past precedent union activity dealing with wages, working conditions, and other elements of the labor market is completely outside the Sherman Act. We have argued further that no union activity regulated by the federal labor laws should now be regulated by the antitrust laws. Having made that legal presentation, we wish to add a few remarks on the practical effects of union efforts to stabilize wages and working conditions in a competitive economy.

Since the pioneering studies of the then Professor Paul Douglas it has become a much-debated point among labor

economists whether the spread of unionism has brought any substantial long-term shift in the distribution of income in favor of the wage-earning class.[21] What concededly has been accomplished by union pressures, however, is a greater uniformity in wage levels from firm to firm, from region to region, and from business cycle to business cycle. Princeton economist Richard Lester has thus observed that "the wage structure in American industry now is probably less 'distorted' than it was in all nonunion industry during the 1920's."[22] In addition, the hiking of rates in former low-wage areas has been cited as a frequent spur to increased labor productivity.[23]

Comments by Professor Cox on the economic aspects of union wage equalization programs are especially relevant in the present instance. He says:

> "A casual observer is struck by the fact that the international unions which impose the most uniform wage patterns upon competing employers are usually found in two environments. One group is the oligopolistic industries—basic steel, meatpacking and rubber—where there appears to be little competition in basic prices. ***
>
> "The other environment is characterized by competition so intense as to raise serious problems during

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[21] See, *e.g.*, Douglas, *Real Wages in the United States, 1890-1926* (1930); Kerr, "Labor's Income Share and the Labor Movement," in Taylor and Pierson, eds., *New Concepts in Wage Determination* 260, 280-87 (1957); Reynolds, *Labor Economics and Labor Relations* 467-75 (3d ed., 1959); Peltzman, "The Relative Importance of Unionization and Productivity in Increasing Wages," 12 Lab. L. J. 716, 725 (1961). It has also been said that "even within the framework of price theory and assuming unions to be monopolies, it is not necessarily true that under unionism wages are higher but employment is less." Meyers, "Price Theory and Union Monopoly," 12 Ind. and Lab. Rel. Rev. 434, 445 (1959).

[22] Lester, "Reflections on the 'Labor Monopoly' Issue," 55 J. Pol. Econ. 513, 523 (1947).

[23] See, *e.g.*, Slichter, *The Challenge of Industrial Relations: Trade Unions, Management, and the Public Interest* 34, 69, 72-73 (1947).

any slackening of business activity. The bituminous coal and garment industries are the best examples. In the garment industry, competition was formerly so intense, and wages were so large a part of total cost, that individual firms were driven to hire at rates which the management knew to be inadequate, and a union could not exist without market-wide organization. The history of the coal industry is similar. No one seriously suggests that putting wage scales back into competition would be in the public interest in this environment."[24]

Measured even by the criteria of a competitive economy, there is no proof that union efforts to achieve uniform terms of employment have deleterious effects upon wage or price structures. The most marked tendency is to smooth out the peaks and troughs during business fluctuations in fiercely competitive industries, not to pitch wage rates at abnormally high, inflationary levels. The result is salutary for both employers and employees.

Labor contracts establishing more or less standardized rates in a given industry or market area are generally secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern" for agreeements with other firms. Between 80 and 100 percent of the workers under union agreement are covered by multi-employer contracts in such important industries as men's and women's clothing, coal mining, building construction, hotels, longshoring, maritime, trucking, and warehousing. Between 60 and 80 percent of unionized workers are under multi-employer pacts in baking, book and job printing, canning and preserving, textile dyeing and finishing, glass and glassware, malt liquor, pottery, and retail trades. Professor Lloyd Reynolds of Yale, after citing these figures, adds: "There seems also to be a clear tendency for the proportion of unionists cov-

[24] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 277.

[25] Reynolds, *Labor Economics and Labor Relations* 170 (3d ed., 1959).

ered by multi-employer agreements to increase over the course of time."[25] In some other major industries relatively uniform terms of employment are obtained through the negotiation of a contract with one leading employer and the subsequent acceptance of that contract's key provisions, with only minor modifications, by the other employers in the industry.[26]

Any decision casting doubt on the legality of a union's insistence upon a standard contract, or on the legality of a union-employer association agreement that a particular contract will be the standard for an industry, would therefore jeopardize widespread, increasingly used bargaining procedures. It would do so despite much testimony that such procedures benefit an industry and its workers, and despite no showing that they harm the long-range interests of any substantial group in our society. The decisions below are thus not just legally wrong; they make no economic sense.

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[25] See Chamberlain, *Collective Bargaining* 275 ff. (1951). The steel industry until recently supplied a classic example of pattern bargaining. Now negotiations partake more of the nature of multi-employer bargaining, with the union and a committee representing the larger producers agreeing on an "economic package" and certain other critical terms of employment, the substance of which is then incorporated into the various individual labor contracts. See 45 LRRM 11-20 (1960); 49 LRRM 13-19 (1962).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for petitioner, the judgment of the court below should be reversed.

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